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VIA FACSIMILE AND MAIL

Jane L Rodda, Acting Chief Administrative Law Judge
Hearing Division
Arizona Corporation Commission
400 West Congress Street
Tucson, AZ 85701

Re: Docket No. T-00000A-00-0194

Dear Judge Rodda:

During the prehearing conference and oral argument on Staff's Motion for Clarification on December 7, 2000, in the above matter, you and two intervening parties asked questions of Qwest to which Qwest agreed to provide a written response. First, you asked how long it would take Qwest to present cost studies and testimony if you granted Staff's Motion for Clarification and revisited the rates the Commission approved in Decision No. 60635. Second, WorldCom asked Qwest to confirm that the zones the Commission used to establish interim deaveraged loop rates were based upon Qwest's existing retail rate zones, and, third, Z-Tel requested clarification of the SGAT rates for which Qwest provided cost studies and testimony in Phase II.

Regarding your question on timing, if you grant Staff's motion as well as the additional requests of AT&T and WorldCom to review all unbundled network element rates that were approved in Decision No. 60635 in their entirety, Qwest will require until March 1, 2001 to prepare cost studies and testimony on those issues for this proceeding. As Qwest argued in opposition to Staff's motion, reopening the entire previous cost docket is a tremendous undertaking, and Qwest currently has cost proceedings pending in other states that are limiting its resources. In addition, Qwest would have to revise and refile most of the studies it filed in October because many of those studies were based upon or assumed the applicability of rates established in the original cost docket. The March 1 date assumes that many of these studies would need to be revised. Accordingly, Qwest believes that March 1, 2001 is the earliest date on which it could provide cost studies and testimony on the unbundled network elements addressed and approved in Decision No. 60635.

If you grant a more limited request that requires the parties to revisit only some of the unbundled network element rates previously approved or that limits the scope of review of the previously-approved rates to a limited review or a review based upon the previous Commission record, Qwest believes it could provide testimony and/or cost studies sooner than March 1, 2001. However, without knowing precisely the scope of such a more limited review, Qwest is unable to provide a date certain upon which it could provide supplemental testimony.

Regarding WorldCom's request for confirmation, Qwest confirms that the interim deaveraged rates the Commission approved in Decision No. 62753 were based upon use of Qwest's existing retail rate zones. Decision No. 62753 at pages 5 and 6 states that the Commission adopted the methodology proposed by Qwest, but with the modification that "deaveraged rates should be based on the current retail zone structure . . . ." Qwest submitted a late-filed exhibit that applied its methodology to the current retail rate zones and maintained the statewide average loop rate of $21.98.

Regarding Z-Tel's question on the scope of Qwest's filing in Phase II, Qwest filed available cost studies for those unbundled network elements for which the Commission had not previously approved rates but that Qwest is required to unbundle as a result of the FCC's UNE Remand Order. It also provided cost studies and testimony on those elements or issues the Commission ordered it to address in Phase II (such as permanent deaveraged loop rates). In addition, Qwest submitted cost studies and testimony relating to those issues that had been remanded to the Commission by Judge Panner in U S WEST Communications, Inc. v. Jennings, 46 F. Supp. 2d 1004 (D. Az. 1999), with the exception of the four-wire loop rate (which Qwest inadvertently omitted from its Phase II filing and would propose addressing in Phase III). Lastly, Qwest submitted cost studies and testimony relating to line sharing and collocation that were affected by the FCC's Line Sharing and Advanced Services Orders and proceedings. Thus, referring to Exhibit A of the SGAT, Qwest submitted cost studies and testimony in Phase II of this proceeding relating to SGAT §§ 6.1, 6.2, 8.0, 9.2, 9.3, 9.5, 9.8, and 9.9. Qwest proposes addressing in Phase III those elements or services that do not have Commission-approved rates and for which Qwest has not yet submitted testimony and cost studies in Phase II.

Finally, for your convenience, Qwest attaches hereto the portions of Staff's briefing in the Arizona federal court litigation arguing that the Commission's unbundled element rates comply

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with the FCC's TELRIC pricing rules that Ms. Sacilotto referenced and quoted during the argument on Staff's motion.

I hope this information answers all of the questions posed during the prehearing conference.

Very truly yours,

Timothy Berg

TB:kms

Cc: Docket Control (w/attachments)
All Parties of Record (w/attachments)
Maureen Arnold (w/attachments)
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IN THE UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

U S WEST COMMUNICATIONS, INC. a Colorado Corporation, Plaintiff, v. RENZ D. JENNINGS, MARCIA WEEKS, AND CARL J. KUNASEK, as members of the ARIZONA CORPORATION COMMISSION, and TCG PHOENIX, a general partnership, Defendants. AND CONSOLIDATED MATTERS	No. CIV 97-0026 PHX-OMP CIV 97-0027 PHX-OMP CIV 97-0394 PHX-OMP CIV 97-1723 PHX-OMP CIV 97-1856 PHX-OMP CIV 97-1927 PHX-OMP CIV 97-2025 PHX-OMP CIV 97-2324 PHX-OMP CIV 98-0342 PHX-OMP CIV 98-0626 PHX-OMP CIV 98-0629 PHX-OMP (Consolidated)

SURREPLY BRIEF OF THE ARIZONA CORPORATION COMMISSION IN RESPONSE TO THE REPLY BRIEFS OF MCI, e-spire™ AND AT&T

if they purchase services on a resale basis from U S WEST.[2] These subsidies are important to consider when examining the CLECs' use of unbundled elements. The CLECs fail to disclose these facts to the Court because they make their case far less compelling.

In summary, the CLECs are asking this Court to substitute its judgment for that of the Commission on issues of fact. This Court cannot overturn the Commission's decision if there is any reasonable basis for it in the record. Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc., 419 U.S. 281, 285-86, 95 S.Ct. 438, 442 (1974).

The Commission's Surreply Brief[3] responds to certain specific matters raised in the CLEC's Reply Briefs. The Commission's silence on matters it has previously addressed in its Response Brief should not be construed as acquiescence with the CLEC's Reply Briefs' repetition of their arguments. The Commission continues to maintain that the CLECs have not demonstrated that the Commission's decision was unsupported by the record or unreasonable.

II. THE UNBUNDLED NETWORK ELEMENT RATES ESTABLISHED BY THE COMMISSION ARE NOT ARBITRARY AND CAPRICIOUS.

A. The Various Input Values Adopted by the Commission Were Supported by the Record and Were Not Arbitrary and Capricious.

1. Cable Sheath Miles.

The Commission relied, in large part, upon evidence submitted by U S WEST in finding that the cable sheath mileage default factor contained in the Hatfield Model and adopted by the Arbitrators was too low. The Commission's decision contains an in-depth discussion of this issue, the positions of the parties, and the Commission's reasons for adopting a factor very close to what U S WEST had submitted.

The CLECs continue to urge rejection of the sheath mileage factor adopted by the Commission because they claim that at least one of the Commissioners, if not a majority, may have considered extra record evidence since the factor adopted by the Commission was identical to the cable sheath mileage factor contained in the updated Hatfield Model 3.1. However, even if this is

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[2] In the Matter of the Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, First Report and Order, CC Docket No. 96-98 (rel. Aug. 8, 1996).

[3] Commission's Surreply Appendix, hereinafter will be referred to as: "Commission's App." Commission's Response Brief Appendix Exhibits hereinafter "Commission's Resp. Br. App. Ex."

true and a majority of the Commissioners did consider the updated Hatfield Model's sheath mileage factor, it would constitute harmless error in this case.

The Commissioners had substantial evidence before them that the cable sheath mileage factor contained in the Hatfield Model 2.2.2 and recommended by the Arbitrators greatly understated the amount of cable in a forward-looking, least cost network. e•spire™ Op. Br. App. Ex. A138-A141. As the Order states, the Commission relied upon evidence that the Hatfield Model 2.2.2 accounts for only 36% of the actual existing miles of cable on an embedded basis and only 46% of the forward-looking miles that U S WEST's cost model estimated. Decision No. 60635, p. 15; U S WEST Op. Br. App. Ex. 21 (Santos-Rach Rebuttal) at 17-18. U S WEST Resp. Br. App. Ex. 29. In addition, there was evidence in the record that U S WEST had reinforced its cable resulting in the need for a higher value. Decision No. 60635, p. 15; U S WEST Op. Br. App. Ex. 21. The Commissioners had determined that a value higher than the Arbitrators' recommendation was necessary. e•spire™ Op. Br. App. Ex. A137-A141. The record evidence supported cable sheath mileage factors within a range of approximately 15,000 and 43,000. U S WEST had also asked the Commission to take judicial notice of the decisions of other States concluding that the cable sheath mileage factor contained in the Hatfield 2.2.2 was erroneous. Jan. 8, 1998, Op. Mtg., e•spire™ Op. Br. App. Ex. A137-A141.

Consequently, the Commissioners had determined that the Hatfield's 2.2.2 factor of approximately 15,000 was too low. Id. Had the Commission not adopted the figure of 26,092, it would likely have gone with the slightly higher number offered by U S WEST. Id. If the Commission had gone with U S WEST's cable sheath mileage factor, the unbundled network element rate that the CLECs would have to pay to U S WEST would have been even higher. Unless there is substantial prejudice as a result of the Commission's reliance upon extra-record evidence, the decision must be affirmed. Marathon Oil Company v. Environmental Protection Agency, 564 F.2d 1253 (9th Cir. 1997).

In addition, at least one other District Courts has ruled that consideration of extra-record evidence in a telecommunications interconnection arbitration proceeding under the 1996 Act is appropriate, given the nature of arbitrations. See, MCI Telecommunications Corp. v. Pacific

Bell, et al., No. C97-0670 SI et al., (N.D.C. Cal. Sept. 29, 1988) Sprint Br. App. Ex. 5 ("The Court rejects MCI's arguments and concludes that the CPUC did not err by considering extra-record evidence during the arbitrations. The Act permits the CPUC to arbitrate the matters submitted for its consideration, and as another district court ruling on this issue has noted, '[a] hallmark of effective arbitration involves evaluation and circulation of relevant information."); See GTE South Inc. v. Morrison, et al., 6 F.Supp.2d 517, 525 (E.D. Va. 1998).

In summary, even if the CLECs are correct that one of the Commissioners considered extra-record evidence, it was harmless error. Moreover, the Commission's determination is supported by the record and was well within the range of values already contained in the record.

2. Cost of Capital.

The Commission did not randomly select a cost of capital between the two proposals before it as alleged by e•spire™, or arbitrarily depart from the evidence presented to it as alleged by GST. e•spire™ Reply Br. at p. 3; GST Reply Br. at p. 4. Both GST and e•spire™ would have this Court believe that the Commission must choose only from the specific input values proposed by the parties and that the Commission cannot independently consider the evidence and use its best judgment in choosing a different value supported by evidence in the record. This assertion flies in the face of well-established case law and would inappropriately restrict the Commission's ability to effectively evaluate the evidence and make a reasoned determination. See Southwestern Pennsylvania Growth Alliance v. Browner, 121 F.3d 106 (3rd Cir. 1997).

The Commission did not act arbitrarily or ignore the record but rather relied upon evidence that U S WEST would be subject to increased risk when its core monopoly business, local service, was opened to competition. (Generic Cost Proceeding) Tr. at 411; U S WEST Resp. Br. App. 37. U S WEST had presented evidence that its proposed cost of equity should be 12.85%, only slightly higher than the figure adopted by the Commission. (Generic Cost Proceeding) Tr. at 392, 398; U S WEST Resp. Br. App. 21. Once again where it was to their benefit, the CLECs urge the use of a historical cost of capital equivalent to the one (11.4%) adopted by the Commission in U S WEST's last rate case. See e•spire™ Op. Br. at p. 16.

Even if the Commission erred as the CLECs claim, which it did not, the error was

harmless since the figure ultimately adopted by the Commission was lower than the 12.85% recommended by the Arbitrators and proposed by U S WEST and therefore there is no prejudice to the CLECs. Marathon Oil Co. v. E.P.A., supra.

3. Depreciation Rates.

Both AT&T and e•spire™ continue to contend that the 15-year depreciation life that the Commission adopted for copper wire is arbitrary and capricious. AT&T Reply Br. at p. 11; e•spire™ Reply Br. at p. 3. e•spire™ characterizes the Commission's determination as a "coin flip". Id. Once again e•spire™ improperly relies on an isolated exchange between the Commissioners during their Open Meeting Deliberations to impeach the Commission's Order and completely ignores the remainder of the Commission's lengthy deliberations on this issue and the language of the Commission's Order. Because the Commission's consideration of the relevant factors contained in the record is apparent on the face of the Order, the Court should not resort to the Open Meeting remarks of individual Commissioners as e•spire™ urges.

AT&T continues to argue that the Commission could not deviate from the depreciation rates established by the Commission over five years ago for retail services. AT&T Reply Br. at p. 11. This argument is noncompelling, particularly in light of AT&T's position that the Commission must adopt "forward-looking" input values that reflect a forward-looking, least cost, efficient network. AT&T also argues, without providing any cites to the record, that the rate adopted by the Commission is "inconsistent" with every other state in which U S WEST provides service. AT&T Reply Br. at p. 11. It is clear from AT&T's arguments that it only demands the use of "forward-looking" data when it will benefit AT&T. Since it does not in this instance, it comes as no surprise that AT&T claims that the Commission erred when it used forward-looking data instead of using historical depreciation rates established over five years ago.

As is apparent from the language of the Commission's Order, the Commission carefully considered the positions of all parties; however, it ultimately adopted the position of U S WEST. The Commission relied upon evidence presented by U S WEST in adopting a forward-looking 15 year depreciation life. U S WEST introduced a depreciation study prepared by Technology Futures, Inc. which as adjusted by U S WEST supported a 15 year depreciation life for

buried and underground copper. Santos-Rach Direct Ex. 9 at p. 33. U S WEST Resp. Br. App. Ex. 25. The Commission accepted U S WEST's evidence on this matter. This Court should affirm the Commission's determination, as it is based upon the record evidence.

4. Overhead Factor.

AT&T argues that the Commission's selection of an overhead factor was arbitrary and capricious, alleging that the Commission "failed to follow its own rules." AT&T Reply Br. at p. 13. The Commission adopted the Arbitrators' Recommendation in this instance which was supported by the evidence in the record and the Commission's own rules. A.A.C. R14-2-1310, Pricing - Commission App. Ex. 1.

Furthermore, both the Commission's Order and the Open Meeting deliberations indicate that the Commission believed that U S WEST had presented sufficient evidence to rebut the 10% overhead default value contained in the Commission's rules. Decision No. 60635 at p. 13, U S WEST Op. Br. App. Ex. 21. The Commission was not bound to accept the exact number proffered by U S WEST. Rather, the Commission, based upon all of the evidence before it, exercised its own independent judgment in finding that the overhead rate of 15% recommended by the Arbitrators should be adopted. AT&T is simply wrong when it asserts that the Commission "announced" one standard and "applied" another. AT&T Reply Br. at p. 13.

In addition, the record does not support e•spire's™ claim that some further "modification" is needed to the 15% factor.

5. Network Maintenance Costs.

AT&T argues that the Commission's adoption of a 15% reduction in U S WEST's maintenance costs was "plucked from thin air". AT&T Reply Br. at p. 14. This assertion is belied by the Commission's Order which when examined on this issue makes clear that the Commission considered the Hatfield's presumed 30% reduction in network maintenance costs over historical levels and found that a 30% reduction was too high. On the other hand, the Order explains that U S WEST had proposed adoption of its 1995 maintenance expenses trended for inflation and productivity and that the Commission also rejected these historical values as being too low. Decision No. 60635 at p. 14, U S WEST Op. Br. App. Ex. 21. As a result of the Commission's

rejection of both positions, the Commission exercised its independent judgment, finding that the record supported a 15% reduction in network maintenance costs. Decision No. 60635 at p. 14, U S WEST Op. Br. App. Ex. 21.

e•spire™ once again argues that, while it supported the 15% value for network maintenance reduction, the Commission once again did not make an important "modification" which was necessary, thus rendering the Commission's determination "arbitrary and capricious." e•spire™ Reply Br. at p. 4. This Court should reject e•spire's™ arguments that some further "modification" was needed to reflect a reduction to labor costs in the future. It is clear that the Commission considered labor costs and apparently rejected e•spire's™ claim that a further reduction for labor costs was necessary. Oct. 28, 1998 Op. Mtg. Tr. pp. 89-105, Commission Resp. Br. App. Ex. 17.

6. Structure Sharing.

e•spire™ argues that "[t]he Commission's conclusion that ILECs would share placement costs with only one other utility – and then only one-half of the time – is inconsistent with the forward-looking TELRIC methodology adopted by the Commission, particularly given the presence of an increasing number of other utilities, including CLECs, in any forward-looking environment." e•spire™ Reply Br. at p. 4.

e•spire™ is wrong. There was plenty of evidence in the record demonstrating that the Hatfield's default value of 33% was unsupported and not independently verified. Tr. at 834-35 (Siwek), U S WEST Op. Br. App. Ex. 31; Tr. at 1576 (Figueroa), U S WEST Op. Br. App. Ex. 32. Moreover, even the Arbitrators acknowledged that a structure sharing assumption up to 50% would not be unreasonable. Jan. 8, 1998 Op. Mtg. Tr. at 189, e•spire™ Op. Br. App. Ex. A148. The Commission's determination is based upon the evidence in the record and the Commission may exercise its independent judgment to determine the most appropriate value based upon the record. Hix, 986 F.Supp. at 16.

III. THE COMMISSION'S DECISION NOT TO GEOGRAPHICALLY DE-AVERAGE WAS NOT ARBITRARY AND CAPRICIOUS AND DID NOT VIOLATE THE 1996 ACT.

The CLECs argue that the Commission is required to geographically deaverage rates, as a matter of law. See, e.g., GST's Reply Br. at 5. The Commission and the CLECs apparently

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IN THE UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

U S WEST COMMUNICATIONS, INC. a Colorado Corporation, Plaintiff, v. RENZ D. JENNINGS[1], MARCIA WEEKS, AND CARL J. KUNASEK, as members of the ARIZONA CORPORATION COMMISSION, and TCG PHOENIX, a general partnership, Defendants. AND CONSOLIDATED MATTERS	No. CIV 97-0026 PHX-OMP CIV 97-0027 PHX-OMP CIV 97-0394 PHX-OMP CIV 97-1723 PHX-OMP CIV 97-1856 PHX-OMP CIV 97-1927 PHX-OMP CIV 97-2025 PHX-OMP CIV 97-2324 PHX-OMP CIV 98-0342 PHX-OMP CIV 98-0626 PHX-OMP CIV 98-0629 PHX-OMP (Consolidated)

POST HEARING BRIEF OF THE ARIZONA CORPORATION COMMISSION ON THE IMPACT OF THE RECENT SUPREME COURT RULING IN AT&T CORP. v. IOWA UTILITIES BOARD

Defendants Jim Irvin, Carl J. Kunasek and Tony West, as members of the Arizona Corporation Commission (hereinafter referred to as the "Commission"), by their attorneys, file this post-hearing brief on the impact of the United States Supreme Court's recent decision in

[1] The Commission notes that Renz D. Jennings was succeeded as corporation commissioner on January 1, 1999, by Tony West.

Consequently, although the United States Supreme Court may have reversed the Eighth Circuit on a number of jurisdictional issues, including the FCC's authority to adopt pricing rules to govern State commission pricing determinations, it is the State commissions under Section 252(e) of the 1996 Act that have the responsibility to actually determine the rates to be charged. Thus, while State commissions are now bound to follow the FCC's broad pricing rules or guidelines in the future, State commissions still have considerable discretion within those broad guidelines to balance the positions of the various parties and come to an appropriate resolution. See AT&T Corp. v. Iowa Utilities Board, slip op. at 16 (the state commissions will apply the FCC standards and "implement that methodology, determining the concrete result in particular circumstances.").

The FCC has no authority to actually set or establish any rates under the plain language of Section 252(d). Therefore, the State commissions' ratemaking determinations under the 1996 Act are entitled to substantial deference.

IV. IF THE COURT DECIDES TO ADDRESS THE UNITED STATES SUPREME COURT'S DECISION, THE COURT SHOULD AFFIRM THE UNBUNDLED NETWORK ELEMENT RATES ESTABLISHED BY THE COMMISSION SINCE THEY ARE IN COMPLIANCE WITH THE 1996 ACT AND FCC RULES.

The FCC's pricing rules for unbundled network elements are contained at 47 C.F.R., Subpart F, Sections 51.101 through 51.515. The rates for unbundled network elements established by the Commission comply with all of these rules. First, under Section 51.503, the rates established by the Commission are just, reasonable and nondiscriminatory. They comply with the rate structure rules set forth in Sections 51.507 and 51.509 and were established pursuant to a forward-looking economic cost-based pricing methodology. In addition the rates for unbundled network elements do not vary on the basis of the class of customers served by the requesting carrier, or on the type of services that the requesting carrier purchasing such elements uses them to provide.

The rates also comply with Section 51.505 of the FCC rules. The rates established by the Commission were based upon the most efficient telecommunications network configuration and technology, and the forward-looking economic cost of the network .

As noted at p. 7 of the Commission's Order in the Consolidated Cost Docket (Decision 60635, p. 7, U S WEST Op. Br. App. Ex. 21), the Commission rejected U S WEST's model platform because it was based in part upon embedded costs and technology. The Commission used the Hatfield Model platform as a starting point in its analysis to determine the cost of unbundled elements. Id. The Hatfield Model was sponsored by AT&T and MCI. Both AT&T and MCI argued that the Hatfield Mode was in compliance with the 1996 Act and FCC Rules. Id. at 6. Indeed, the Commission's Order notes that the Hatfield Model "considers the demographics and geography of each state in forecasting element costs, and was used by the FCC in the determination of proxy prices." Id.

Moreover, the model inputs chosen by the Commission were also all based upon the forward-looking costs involved. First, as the FCC rules require at 51.505(b)(2), the Commission utilized a forward-looking cost of capital which reflected the "increased risk" to U S WEST associated with competition. The cost of capital adopted by the Commission was very close to that recommended by the arbitrators. On the other hand, the CLECs urged the Commission to use U S WEST's historical cost of capital which does not comply with the FCC rules.

Second, the depreciation rates utilized by the Commission were also forward-looking as required by 51.505(b)(3) of the FCC rules. In addition, they are the "economic" depreciation rates produced by the Technology Futures, Inc. study, with some adjustments. The CLECs once again urged the Commission to use U S WEST's historical depreciation rates which do not comply with the FCC rules. In addition, the depreciation rates advocated by the CLECs for copper were not based upon "economic" lives, as required by the FCC rules, but instead reflected the plant's "physical" life.

Third, the Commission also utilized a forward-looking allocation of common costs. The Commission was not required to adopt the 10 percent default allocation contained in its rules or in the Hatfield Model, that value having been successfully rebutted by U S WEST.

In addition, all of the other input values adopted by the Commission were based upon forward-looking costs or considerations. Further, as required by Rule 51.505(d), the Commission did not consider embedded costs, retail costs, opportunity costs or revenues to

subsidize other services. The Commission's unbundled network element rates also comply with Rule 51.505(e) of the FCC rules. The Commission gave full and fair effect to the economic cost based pricing methodology described in that section and provided notice and an opportunity for comment to affected parties with a written factual record sufficient for purposes or review.

The Commission's loop rate also complies with Section 51.509 of the FCC's rules. In addition the Commission's unbundled network element rates comply with Section 51.511 of the FCC's rules having been based upon the forward-looking economic cost of each element. In summary, should the Court address the impact of the Supreme Court's decision on the issues presented, it should find that the Commission's unbundled network element rates comply with the FCC rules.

V. IF THE COURT DECIDES TO ADDRESS THE IMPACT OF THE UNITED STATES SUPREME COURT'S RULING, THE COURT SHOULD AFFIRM THE WHOLESALE DISCOUNT RATES ESTABLISHED BY THE COMMISSION SINCE THEY COMPLY WITH THE 1996 ACT AND FCC RULES.

The wholesale discount rates established by the Commission also comply with the FCC's pricing rules. The Commission's Order, (Decision No. 60635 at p. 36, U S WEST Op. Br. App. Ex. 21), states that it found MCI's method to be the most reasonable in calculating the avoided cost discount. MCI estimated costs which reasonably would be avoided in selling at wholesale. (Id. at p. 36). According to MCI, its method comported with the FCC's rules and was consistent with the 1996 Act. (Recommended Opinion and Order ("ROO"), p. 32, U S WEST Resp. Br. App. Ex. 34) According to MCI, it had followed the FCC's guidance in its proposal for which categories of costs are avoidable by an economically efficient carrier selling at wholesale, and the percentage of each category which is avoidable. MCI applied the percentage avoidable to each category of publicly available U S WEST cost data for 1995, yielding a percentage of its total costs, which would be avoidable. Id. MCI based the discount on U S WEST's embedded costs, using actual expenditures rather than TSLRIC. Id.

The Recommended Opinion and Order further explained that U S WEST had disputed the MCI study and had recalculated MCI's discount, resulting in a weighted discount of 14.09 percent. (p. 33, U S WEST Resp. Br. App. Ex. 34).

The following pages 24-26 are from the Defendant-Apellees Answering Brief filed by the Arizona Corporation Commission on January 20, 2000 in the Ninth Circuit Court of Appeals in Docket No. 99-16427, et. al.

011-018. Further, the Commission must ultimately examine the record including the rates established for unbundled network elements and the wholesale discount for compliance with the new FCC rules. The Commission will be beginning such a proceeding in the near future.

For all of the reasons discussed, this Court should affirm the District Court's ruling.

B. The District Court Did Not Err In Affirming The Commission's Adopted Cable Sheath Mileage As A Component Of Unbundled Loop Costs.

e-spire appeals from the District Court order affirming the ACC's adopted input for cable sheath mileage as a cost component in determining unbundled loop costs. At the outset it must be noted that the cable sheath mileage determination is an issue of fact, necessarily involving the ACC's exercise of its technical expertise, rather than an interpretation of Federal Law. As such, the District Court reviewed the ACC, and this court reviews the District Court, on an arbitrary and capricious standard of review. See Hix, supra.

e-spire's objection to the ACC's adopted cable sheath mileage determination amounts to a claim that the mileage adopted by the ACC is not consistent with the evidence presented. A brief restatement of the argument to this court, as e-spire makes it in its Brief at 7, will provide a useful backdrop for the court's consideration of this issue. e-spire starts its argument by noting that the ACC used a different cable sheath mileage than was recommended by its hearing officers in their recommended decision and order. e-spire goes on to claim that the cable sheath mileage adopted by the ACC came from a particular version of the Hatfield Model (3.1), which was different than the version in evidence in this case (2.2.2) (Id. at 13). e-spire concludes that the ACC Order is internally inconsistent for failure to adopt the mileage from the previous version of Hatfield, is contrary to

the TELRIC costing methodology employed in the FCC's rules, was driven by considerations other than adopting TELRIC and is unsupported in the record because Hatfield version 3.1 was not in evidence.

In considering this issue, the first thing this court should do is disregard all of e-spire's arguments insofar as they rely on some notion that the recommended opinion and order by the arbitrators was evidence in support of a potential outcome, and insofar as they rely on a recounting of the discussion among the ACC commissioners at their Open Meeting in deciding the issues. The ACC speaks through its Orders, not through discussions among individual commissioners, nor is the ACC bound in any way by the recommendations of its hearing officers, See Pine-Strawberry Improvement Ass'n v. Ariz. Corp. Comm'n, 152 Ariz. 339, 732 P.2d 230 (App. 1986), ACC App. A00042. The only issue properly presented to the District Court, the affirmance of which is appealed herein, is whether the ACC order is supported by the record, not what intent a commissioner may have had in proposing an amendment to the recommendation, as might be shown by the discussions at the Open Meeting.

As to the appropriate issue, whether the ACC decision is supported by the record in the proceeding, the answer is undeniably that it is. The adopted cable sheath mileage amount is 26,092. The record contained a wide range of cable sheath mileage estimates, ranging from the Hatfield Model's factor of 15,600 to the U S WEST RLCAP model factor of 26,589. The arbitrators had even reviewed sensitivity analyses of the Hatfield Model using a 26,200 mileage factor. e-spire Brief Appendix at A143. The evidence supported the notion that the Hatfield Model understated the cable sheath mileage factor, in part because the embedded system was reinforced over time and sheath mileage tends to increase over time as U S WEST places more lines to any given area. e-spire Brief Appendix at A018, Decision No. 60635 at 15. It is clear that the evidence supports a range of inputs

for cable sheath mileage in this case. e-spire fails to demonstrate that the ACC's selection of a cable sheath mileage factor within that range was arbitrary and capricious.

Finally, there are some elements of the e-spire discussion which must be pointed out because of the glaring inconsistencies entering into the argument. e-spire proudly points out that the ACC recognized the Hatfield Model as representing "forward-looking, least cost, efficient network technology", consistent with TELRIC. e-spire Brief at 13. e-spire then submits that the ACC relied on an updated version of the Hatfield Model to arrive at a cable sheath mileage determination which e-spire criticizes as not consistent with TELRIC. Id. at 14. e-spire also attempts to bootstrap arguments relating to the effect of the vacated FCC Rules into a rationale to overturn the District Court's decision. Id. at 16. Without referencing any specific rule which the ACC decision allegedly violates, e-spire contends that the District Court did not apply the reinstated rules in deciding this case. However, e-spire itself noted that the ACC explicitly adopted the TELRIC methodology. While e-spire may not agree with one of the evidentiary determinations made by the ACC and affirmed by the District Court, that does not constitute arbitrariness or capriciousness.

The District Court's affirmance of the ACC cable sheath mileage determination should be affirmed. C.R. No. 319 at 19, ACC Supp. Exc. 001 (hereinafter "e-spire Supp. Exc."). U S WEST v. Jennings at 1010. The record contains evidence in support of the ACC determination. There is no reason to overturn the District Court's conclusion that the decision was based on the record, and certainly no reason to believe that the ACC failed to follow the TELRIC methodology just because it refused to follow the discredited cable sheath mileage calculations in the Hatfield Model.